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CHARLES ELMORE CROPL
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 585

In the Matter

of the

Petition of COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO, for exemption from or limitation of liability, as owner of the Steamship "MANDU",

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
Petitioner-Shipowner,

THE GREAT AMERICAN INSURANCE COMPANY, *et al.*,
Respondents-Cargo Claimants.

PETITION OF COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FRANK J. McCONNELL,
Proctor for Petitioner Companhia de Navegacao Lloyd Brasileiro.

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T. CATESBY JONES,
LEONARD J. MATTESON,
Of Counsel.

INDEX.

PAGE

Shipowner's Petition for Certiorari 1

Statement 1

I—Errors contained in the first decision of the Circuit Court of Appeals, which is reported under the style of *The Maudu*, 102 F. (2d) 459 10

II—Errors contained in the second opinion of the Circuit Court of Appeals which is reported under the style of *The Maudu*, 114 F. (2d) 361 11

Reasons for Granting the Writ 12

Brief for Petitioner Shipowner..... 19

The Opinions Below 19
The Opinions of the District Court 19
The Opinions of the Circuit Court of Appeals... 20
Jurisdiction of this Court 21
Facts 21

POINT I—The decision of the Circuit Court of Appeals on the first appeal in this case which held that a bare assignment without consideration and which was not intended to transfer any beneficial interest to the assignee, is sufficient to enable such an assignee to maintain a suit in admiralty is in direct conflict with the decision of this Court in *Fretz* v. *Bull* and with the decisions in the Fifth and Ninth Circuits 23

POINT II—The decision of the Circuit Court of Appeals upon the first appeal holding that the refusal by the District Court to entertain jurisdiction in a suit between foreigners arising out of a collision occurring in the territorial waters of a foreign country where jurisdiction was supported only by a colorable assignment of claims, without

PAGE

consideration, and without transfer of beneficial ownership, was an abuse of discretion, is in square conflict with the decisions of this Court in *Canada Malting Co.* v. *Patterson*, 285 U. S. 413 and other cases 27

POINT III—The decision of the Circuit Court of Appeals holding the "Mandu" contributorily at fault and your petitioner liable for one-fifth of the damages because of "inferential faults" on the part of the "Mandu" is in conflict with the decisions of this Court in *The City of New York*, 147 U. S. 72, 85; *The Victory and The Plymothian*, 168 U. S. 410, 423, and other cases, and in conflict with the decisions in all other circuits..... 34

Conclusion 38

TABLE OF CASES CITED:

Armour v. *Fort Morgan Steamship Co.*, 270 U. S. 253, 15, 30

Barney v. *Baltimore City*, 6 Wall. (73 U. S.) 280, 4, 5, 32

Beaverbrae, The (E. D. N. Y., Campbell, *D. J.*), 60 F. (2d) 363 29

Belgenland, The, 114 U. S. 355.....14, 33

Bywell Castle, L. R. 4 Prob. Div. 219..... 37

Canada Malting Co. v. *Patterson*, 285 U. S. 413, 14, 24, 26, 27, 28

Carroll, The, 8 Wall. 302 .....16, 37

Charter Shipping Co. v. *Bowring*, 281 U. S. 315....14, 28

City of New York, The, 147 U. S. 72.....12, 15, 34, 35

Clara Matthen, The (D. C. Mass.), 25 F. (2d) 123..16, 37

Eastfield S. S. Co., The, v. *McKeon, et al.* (S. D. Ala.), 186 Fed. 357 .....13, 26

PAGE

Eastfield S. S. Co. v. *McKeon, et al.* (S. D. Ala.) (C. C. A. 5), 201 Fed. 465 ..... 13, 26, 27
Eemdyjk, The, 286 Fed. 385 ..... 13, 25, 26
Elizabeth Jones, The, 112 U. S. 514 ..... 16, 37

Falco, The, 20 F. (2d) 362 (C. C. A. 2) 28
Fretz v. *Bull*, 53 U. S. (12 How.) 465, 12, 13, 23, 24, 25, 26, 27

Goldman v. *Furness Withy & Co.* (S. D. N. Y.), 101 Fed. 467 24
Goodrich Transit Co. v. *City of Chicago* (C. C. A. 7), 4 F. (2d) 636 ..... 16, 36
Great Republic, The, 23 Wall. 20 ..... 15, 35

Katahdin, The, 293 Fed. 824 30

Lady Drake, The, 1 F. Supp. 317 ..... 25, 28
Lake Erie Transp. Co. v. *Gilchrist Transp. Co.* (C. C. A. 6), 142 Fed. 89 ..... 16, 36
Lambert Co. v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377 30
Le Flandre (C. C. A. 3), 9 F. (2d) 331 ..... 16, 36
Lizzie M. Walker, The (C. C. A. 4), 3 F. (2d) 921 .. 16, 36

Maggie J. Smith, The, 123 U. S. 349 ..... 16, 36, 38
Mandu, The, 102 F. (2d) 459 ..... 10, 11, 24

Nacooche, The, 137 U. S. 330 ..... 16, 37
Norne, The (C. C. A. 5), 59 F. (2d) 145 ..... 16, 37
Northern Nav. Co. v. *Minnesota Atlantic Transp. Co.* (C. C. A. 8), 49 F. (2d) 203 ..... 16, 36

Oregon, The, 158 U. S. 186 ..... 16, 35, 37

Pacific Spruce Corp. v. *San Francisco* (C. C. A. 9), 72 F. (2d) 712 ..... 16, 36
Paul L., The, 4 F. Supp. 537 30
Paula, The (*Peters* case) (C. C. A. 2), 91 F. (2d) 1001 29

PAGE

Priscilla, The (C. C. A. 1), 55 F. (2d) 32.....16, 36

Rideout v. *Charles Nelson* (C. C. A. 9), 55 F. (2d) 783 .....16, 37

Rupert City, The, 213 Fed. 263.....13, 26

Sea Gull, The, 23 Wall. 165.....16, 37

Shawmut, The (E. D. Pa.), 261 Fed. 616.....16, 37

Thomassen v. *Whitwell*, 9 Ben. 113, Fed. Cas. No. 13928 .....14, 33

Trader, The, 129 Fed. 462.....13, 25

Tricolor, The, 1 F. Supp. 934 (S. D. N. Y.), affirmed (C. C. A. 2), 65 F. (2d) 392..... 29

Umbria, The, 166 U. S. 404.....15, 35

Victory, The, and The Plymothian, 168 U. S. 410, 12, 15, 21, 34, 35

Wittig v. *Canada S. S. Lines, Ltd.* (W. D. N. Y.), 59 F. (2d) 428 .....25, 29

Wolsum, The (C. C. A. 5), 14 F. (2d) 371.....16, 36

OTHER AUTHORITIES CITED:

Benedict on Admiralty.....13, 23, 24, 26

Judicial Code, as amended by the Act of February 13, 1925, Section 240(a)..... 21

43 Stat. 938, 28 U. S. C. A., Sec. 347(a)..... 21

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COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
Petitioner-Shipowner,

THE GREAT AMERICAN INSURANCE COMPANY, *et al.*,
Respondents-Cargo Claimants.

Shipowner's Petition for Certiorari.

The petition of Compania de Navegacao Lloyd Brasileiro, owner of the S. S. "Mandu", for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

STATEMENT.

Since The Great American Insurance Company has filed a petition praying for a writ of certiorari, this petitioner desires that the questions which it sets forth below shall be reviewed by this Court.

This proceeding originated because of a suit in admiralty brought by The Great American Insurance Company, a corporation created by the laws of the State of

New York against the Brazilian S. S. "Mandu" under two libels filed in the United States District Court for the Eastern District of New York to recover damages for loss and damage to cargo laden on the German steamship "Denderah", which was sunk on July 31, 1929, as a result of collision with the Brazilian steamship "Mandu". The collision occurred wholly within the territorial waters of Brazil in the Harbor of the Port of Santos. The first libel filed on June 30, 1930 alleged (a) that The Great American Insurance Company had insured unspecified quantities of cargo laden on the steamship "Denderah", had paid the owners thereof for losses, and had become subrogated to the owners' rights (Par. 6, R. 21); and (b) that certain other shipments of cargo laden on the steamship "Denderah" had been insured by other underwriters who paid the losses to the owners, became subrogated to their rights, and assigned their rights "for a valuable consideration" (R. 24) to the libellant, The Great American Insurance Company. The libellant demanded damages in the sum of $217,140 and caused the arrest of the "Mandu". Upon the filing of a stipulation for value by petitioner, a corporation created by the laws of Brazil, in the sum of $218,000 the "Mandu" was released from arrest and made a round trip to Brazil and return. Upon her return in October, 1930, an amended libel was filed on October 22, 1930 in which the amount of the demand was increased to $225,872.31 (R. 19, 39). In the amended libel it was again alleged that other underwriters had assigned their subrogated claims to the libellant "for a valuable consideration" (R. 39). In the amended libel, it was specified that the only owners of claims for goods on which the libellant had issued policies of insurance were Orenstein & Koppel, A.G. and Siemens Schuckert Werke, A.G. As to the shipments by these

companies the libellant alleged that it had paid the amount of its insurance to these assureds and

> "thereby became subrogated to all rights of its said assureds in said shipments to the extent of its said payments and to all their claims against said steamship 'Mandu' arising out of said collision and the said consequent loss and damage to said shipments" (R. 33).

Three days later, on October 25, 1930, The Great American Insurance Company filed an entirely new libel in which it alleged that it had acquired by assignment for *a valuable consideration* additional claims amounting to $137,695.83 and the "Mandu" was again arrested (R. 41). Thus the Brazilian owners of the "Mandu", your petitioner, were confronted with a demand for damages which had increased to the very large sum of $363,568.14, a sum far exceeding the value of the "Mandu".

Petitioner had filed exceptions to the first libel, but the only relief which it obtained from the District Court as a result of those exceptions (R. 26) was an order requiring the Great American Insurance Company to give the names of the assignors (R. 29). Petitioner was thus confronted with the necessity of securing some sort of restraining order to prevent further periodic arrests, since if such arrests continued it would be compelled to abandon its steamship service to the United States (R. 198) and this because of a collision which occurred in Brazilian waters, between vessels one of which was German and the other Brazilian. If these allegations that an American insurance company was in fact the beneficial owner of some of these claims by subrogation and of the remainder by assignment for a valuable consideration had been true, it would have been useless for

your petitioner to contest the jurisdiction, since in such case there could be no question of the jurisdiction. Even in cases of diversity of citizenship, if an assignment is valid and is for a valuable consideration, then the citizenship of the assignee determines the fact of citizenship for the purposes of the question of diversity of citizenship. *Barney* v. *Baltimore City*, 6 Wall. (73 U. S.) 280, at page 288. There was no way by which the petitioner could challenge the libel by excepting to the right of The Great American Insurance Company since Judge Campbell's decision was not appealable. Hence, unless petitioner was willing to forego all earnings of its vessel while it remained tied up at New York awaiting the decision of the court, as a practical matter petitioner was forced to obtain a restraining order by filing a petition to limit its liability. Accordingly, petitioner filed its petition for limitation of or exoneration from liability (R. 52) and on December 10, 1930, gave bail in the limitation proceeding in the sum of $281,650 "to obtain release of the 'Mandu' and to prevent her further arrest and to prevent any further disorganization of petitioner's business by any further libels * * *" (R. 178).

Thereafter The Great American Insurance Company filed a claim in the limitation proceeding, in which it again alleged that it was subrogated "to all [of Orenstein & Koppel's and Siemens Schuckert Werke's] claims against the steamship 'Mandu' arising out of said collision" (R. 90) and alleged that it held assignments acquired "for a valuable consideration" (R. 95) from other claimants, all of which were foreign and most of which were German. In the answer to the petition filed by The Great American Insurance Company it was alleged: "Thereafter, *for a valuable consideration*, said claims and causes of action, the details of which are particularized in this claimant's

aforesaid claim, were duly assigned to this claimant, and *this claimant is now the owner thereof*" (R. 109). The claim so filed by The Great American Insurance Company amounted to $364,008.14 (R. 101, 117). The allegations of the claim and of the answer, if true, were sufficient to support The Great American Insurance Co.'s right to sue. These allegations were that the original owners of the claims had really transferred the claims to The Great American Insurance Company. *Barney* v. *Baltimore City*, 6 Wall. (73 U. S.) 280, 288.

Nearly five years after the arrest of the "Mandu", upon the return of claimant's letters rogatory from Germany (later suppressed on motion, R. 143, 153, 161), petitioner obtained information indicating that The Great American Insurance Company was not the real party in interest and that claimant's interest by way of subrogation represented a small fraction only of such claims, and that no whole claim had been acquired by the claimant by subrogation. In this situation petitioner moved to amend its petition for exoneration from and limitation of liability in two particulars (a) by inserting in the petition new allegations (Article Fourteenth, R. 173) challenging claimant's right to sue and new allegations (Article Thirteenth, R. 172) pleading the Brussels Convention. In addition similar allegations were added to the objection to the claim (R. 174). Thereafter claimant filed exceptions to petitioner's amended petition and amended objection to claims (R. 208). These exceptions were overruled by the District Court by order entered June 10, 1936 (R. 217). The case then came on for trial.

At the trial the claimant offered no testimony supporting its right to sue except in respect of shipments by (1) Siemens Schuckert Werke, A. G. and (2) A. Borsig. With respect to the first, it appeared that the claimant's interest as insurer was merely a small fractional

part of that claim, that is, 2½% or only $164.69 out of a claim of $6,587.50 (R. 505). Therefore it appeared that the allegation of the claim that the claimant had become subrogated to the entire claim with respect to this shipment (R. 90) was untrue. With respect to the interest of A. Borsig, it appeared that the entire loss had been paid by a German insurance company which had assigned its interest to the Great American Insurance Company without consideration and solely for the purpose of permitting the Great American to collect for the benefit of the German insurance company (R. 375, 506). When this evidence had been given, the petitioner immediately moved to dismiss the libels and claim filed by The Great American Insurance Company and for permission to withdraw its petition for limitation of liability (R. 379, 383). The District Court did not consider the question of fault of the respective vessels but held (by decision dated July 21, 1937, Opinion, R. 500) that since The Great American Insurance Company was not the real party in interest (R. 505-6) and was not subrogated to any full claim (R. 506) it had no right to sue (R. 507). The Court thereupon indicated that the claim should be dismissed, but in order not to foreclose persons holding honest claims, it directed an extension of time, for sixty days, to permit them to file claims (R. 508). Decision was reserved on petitioner's motion for leave to withdraw the petition (R. 509). An order was entered in accordance with this decision (R. 510). The Court included in this order the following provision: "that in the event no such valid claims be filed within the said time, then the said motion to withdraw the petition shall be allowed and the present claim dismissed" (R. 512).

Thereafter a large number of new claims were filed within the time limited by the Court. Petitioner filed

exceptive allegations and exceptions to these claims (R. 598), and upon petitioner's motion, claimants were required to disclose the real owners of these claims (R. 620). As a result claimant filed a schedule (R. 622) on November 4, 1937, six years after the libel was filed, from which it was ascertained for the first time that the real parties in interest were sixty-four Germans, nine Brazilians, four Belgians, four Argentinians, three Frenchmen, three Hollanders, two Czecho-Slovakians, one Austrian, one Pole, one Englishman, one Swiss and one Portuguese. No United States citizen was interested. The sole interest of The Great American Insurance Company was 2½ percent of a claim of $6,587.50, or the insignificant sum of $164.59 out of claims aggregating more than $350,000. That is to say The Great American Insurance Company by reason of a small fractional interest in one comparatively minor claim had jeopardized petitioner's business by arresting petitioner's vessel and holding her to bail for hundreds of thousands of dollars.

Upon a hearing on petitioner's exceptions to the new claims the District Court found that: (1) There was "no longer before the Court any claim by any United States citizen" (R. 638); that "all of the claims are those of foreign underwriters" (R. 639); that the collision occurred in the territorial waters of Brazil between a German vessel and a Brazilian vessel (R. 636); and that the Court should "no longer retain jurisdiction of this action" (R. 64). (2) The new claims were barred by the two year limitation of the Brussels Convention (R. 640). (3) The new claims were barred by the Statute of Limitations of the State of New York (R. 640) and by laches (R. 641). The Court also said:

> "There is no doubt that the United States citizen (The Great American Insurance Co.) was endeavor-

> ing to represent foreign underwriters by allegations which were either not proven or shown to be false * * *" (R. 638).

The Court thereupon entered an order dismissing the claims and permitting the petitioner to withdraw its petition (R. 676-679).

The Great American Insurance Company appealed to the Circuit Court of Appeals for the Second Circuit (R. 686), and assigned errors (R. 708) which may be summarized as follows:

First: This Court erred in holding that a party libellant in an Admiralty proceeding must be the real party in interest and that an assignment without consideration and for the purpose of permitting an assignee to bring suit is insufficient to permit a suit to be brought in the Admiralty.

Second: The grounds for dismissal of the new claims in the final decree were insufficient.

Third: The Court should not have permitted the Brussels Convention to be pleaded.

The Circuit Court of Appeals held that the first of these assignments was well taken, but that the second and third were not well taken. The Court reversed the decree of the District Court and sent the case back for decision on the merits between the petitioner and The Great American Insurance Company (R. 738h). This petitioner then sought a stay of the mandate to provide an opportunity for an application to this court for a writ of certiorari. The Great American Insurance Company opposed that stay on the ground that the case should not be brought to

this court piecemeal. The Circuit Court of Appeals ruled with The Great American Insurance Company and sent the case back to the District Court for prompt hearing on the merits. After argument and consideration of the evidence the District Court filed its opinion on the merits (R. 2160) and made Findings of Fact and Conclusions of Law (R. 2173). The District Court held that the collision occurred as a result of the fault of both the S. S. "Denderah" and the S. S. "Mandu" and entered an interlocutory decree against the "Mandu" for half damages (R. 2171-3). The opinion of the District Court was not reported in the Federal Reporter system but appears in the Record (R. 2160-71) and may also be found in 1939 A. M. C. 1313.

This petitioner appealed from the decree holding the "Mandu" at fault and the petitioner liable for half damages. The Circuit Court of Appeals has now by its opinion (R. 2204; 114 F. (2d) 361) modified the decree of the District Court and held that the "Mandu" was not equally at fault with the "Denderah" for the collision; that the faults of the "Denderah" were "four times as serious in degree as those of the 'Mandu'"; and that this petitioner should not be held for half damages, but should respond for only one-fifth of the damages to cargo on the "Denderah" (R. 2208).

The questions which are presented for consideration by this Court arise out of the following errors of the Circuit Court of Appeals for the Second Circuit:

I.

Errors contained in the first decision of the Circuit Court of Appeals, which is reported under the style of *The Mandu*, 102 F. (2d) 459.

It is respectfully submitted that in its first decision the Circuit Court of Appeals erred in the following particulars:

(1) When it held that jurisdiction in Admiralty may be based on a bare assignment without transfer of ownership, given without any consideration whatsoever, not intended to transfer any beneficial interest, but merely a colorable assignment given solely for the purpose of permitting suit to be brought (R. 738d)—*The Mandu*, 102 F. (2d) 459, at page 462.

(2) When it held that it is proper for a Court of the United States to take jurisdiction of a controversy between foreigners (Germans and Brazilians) although no American interest is involved in the controversy, on the theory that the parties to the controversy "had no common home to which they might be sent to try their case" (R. 738e)—102 F. (2d) 459, at page 462.

(3) When notwithstanding the District Court's finding that the allegations in the libel that The Great American Insurance Company acquired claims on which it sued as owner thereof and for valuable considerations were false and misleading, the Circuit Court of Appeals nevertheless held that the petitioner was not misled "in any important particular" because petitioner must have known all along "that the title of the Great American In claims against Mandu, whether by subrogation or assignment,

came from foreign interests" (R. 738f). The Circuit Court of Appeals disregarded the fact that it was the allegations of ownership and valuable consideration which misled the petitioner, not the fact as to the source of the title to the claims.

(4) When it held that it was an abuse of discretion for the District Court to refuse to retain jurisdiction because of foreign interests at the stage which the case had reached (R. 738e, f), although the motion to dismiss the claim was made immediately it appeared that the claimants' allegations as to the assignments and subrogation were untrue.

II.

Errors contained in the second opinion of the Circuit Court of Appeals which is reported under the style of *The Mandu*, 114 F. (2d) 361, 363.

It is respectfully submitted that in its second decision the Circuit Court of Appeals also erred:

Notwithstanding "glaring faults" of the S. S. "Denderah" (the German ship), which it held were four times as great as those of the S. S. "Mandu" (the Brazilian ship), the Circuit Court of Appeals held that the S. S. "Mandu" was also at fault and that your petitioner, as owner of the "Mandu", is liable for one-fifth of the damages because of "inferential faults" on the part of the "Mandu", although it said that "if the District Judge had seen fit to apply the rule that where fault on the part of one vessel is clear and of itself sufficient to account for the collision, doubts as to the management of the other vessel should be resolved in her favor" we should have hesitated to overrule him (R. 2203). The Court overlooked the fact that the District Court refused to apply the well-settled rule that when one

vessel is guilty of glaring faults, the other vessel should not be held guilty of contributing fault without clear and convincing proof (*The Victory and The Plymothian*, 168 U. S. 410, 423; *The City of New York*, 147 U. S. 72, 85). The District Judge found that the fault of the "Mandu" consisted in proceeding at all after giving her third one blast signal (Conclusions 17 and 18, R. 2184) when the vessels were half a mile apart, although the "Denderah" immediately replied with one blast (Fdg. 53, R. 2179). The Circuit Court of Appeals held that this was four minutes before the collision (R. 2206) and that there was no reason why "the 'Mandu' should have sensed danger when she sounded her third one blast signal" (R. 2207). When the Circuit Court of Appeals reversed the holding of the District Court, there was no holding of the District Court relating to fault of the "Mandu" to be affirmed. Consequently, when the Circuit Court of Appeals resolved the doubt as to fault of the "Mandu" against her, on the theory that it was merely not disturbing a holding of the District Court, it was in error. What the Court did was to resolve a doubt as to the fault of the "Mandu" against her. Its action in so doing was in square conflict with the cases cited.

Reasons for Granting the Writ.

(1) The first of the decisions of the Circuit Court of Appeals is in square conflict with *Fretz* v. *Bull*, 12 How. (53 U. S.) 465, 468, where this Court said:

> "In admiralty, the party entitled to relief should always be made libellant; and the practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred, only obtains in particular cases."

The language quoted is taken almost verbatim from Benedict on Admiralty, 1st Ed. §380, the standard work on Admiralty practice.

(2) It is also in conflict with decisions in the Fifth and Ninth Circuits. In *The Trader*, 129 Fed. 462, 471 (D. C. W. D. W.) Judge Hanford said:

> "The intervening libellant has no standing in a court of admiralty, for the reason that the evidence proves affirmatively that he has no interest in any of the matters in controversy. He paid nothing to either of the owners of merchandise or baggage alleged to have been lost or damaged, and the several assignments of claims alleged in his libel were intended to give only color of a right to sue for damages. Courts of admiralty do not encourage litigation by mere volunteers. *The Prussia* (D. C.) 100 Fed. 486; *Minturn* v. *Alexandre* (D. C.) 5 Fed. 119; *Fretz* v. *Bull*, 12 How. 468, 13 L. Ed. 1068."

The Circuit Court of Appeals overlooked the foregoing decision and cited in support of its views the decision in the case of *The Rupert City*, 213 Fed. 263 (R. 738d), a decision by Neterer, *J.*, in which the prior decision of the same court in the case of *The Trader* was overlooked. In the subsequent decision in *The Eemdyjk*, 286 Fed. 385, Judge Neterer recognized the authority of *The Trader*, 129 Fed. 462, in a case where the assignee had no beneficial interest.

In the Fifth Circuit in the case of *The Eastfield S. S. Co.* v. *McKeon, et al.* (S. D. Ala.) the District Court cited Benedict on Admiralty, 1st Ed., Sec. 380, and *Fretz* v. *Bull*, 12 How. (53 U. S.) 465, as the law and stated the rule as follows: "As a general rule, the libel should be in the name of the real party in interest." *Eastfield S. S.*

Co. v. *McKeon*, 186 Fed. 357, 358-9. On this principle, it dismissed the libel. The Circuit Court of Appeals for the Fifth Circuit approved the District Court's statement of the law, *Eastfield S. S. Co.* v. *McKeon*, 201 Fed. 465, 470, but reversed the decision "upon the peculiar undisputed facts shown by the evidence".

(3) The decision below is in square conflict with the decision of this Court in *Canada Malting Co.* v. *Patterson*, 285 U. S. 413, and in *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515. In *Canada Malting Co.* v. *Patterson*, 285 U. S. 413, this Court said:

> "The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower Federal courts."

This rule was approved and applied by this Court in that case and again in *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515. The decision of the Circuit Court of Appeals is not supported by the cases which it cites, to wit: *The Belgenland*, 114 U. S. 355, and *Thomassen* v. *Whitwell*, 9 Ben. 113, Fed. Cas. #13928. Each of those cases involves collisions which occurred on the high seas, whereas the present case involves a collision which occurred within the territorial waters of Brazil. The present decision, which invites foreigners, who have suffered losses within the territorial jurisdiction of one of them, to seek the jurisdiction of the United States Courts, because there is "no common forum", is, we respectfully submit, not supported by any authority. It is further respectfully submitted, that any such doctrine is dangerous and suggests that the Courts of a foreign country are unfit to deal with cases arising within their territorial jurisdiction. Although there is no question of the right of an American citizen, who is the real party in interest, to have his

cause tried in an American Court, this fact is no basis for granting such right to foreigners, who merely seek the jurisdiction of our Courts because they wish to avoid the Courts of the country where the tort occurred. These German claimants, who by colorable assignments, conveyed bare legal title to their claims to an American assignee, nevertheless retaining their actual ownership of these claims, could not thereby acquire the right to come into our courts under the cloak of such an assignment to an American bill collector. The decision below by condoning false and misleading allegations in the libels and claim made to support jurisdiction in the Courts of the United States, is squarely in conflict with the decision of this Court in *Armour* v. *Ft. Morgan S. S. Co.*, 270 U. S. 253, where this Court said at page 359:

> "Jurisdiction in admiralty cannot be effectively acquired by concealing for a time the facts which establish that it does not exist."

(4) The decision of the Circuit Court of Appeals on the second appeal where it held the steamship "Mandu" guilty of "inferential faults" (R. 2208), although the "gross faults of the 'Denderah'" were four times as great as that of the "Mandu", is in square conflict with a long line of decisions of this Court which hold that where the fault of one vessel is clear and gross, and of itself sufficient to account for the collision, any fault of the other must be established by clear and convincing proof.

The City of New York, 147 U. S. 72, 85;
The Umbria, 166 U. S. 404, 409;
The Victory and The Plymothian, 168 U. S. 410, 423;
The Great Republic, 23 Wall. 20, 25.

It is also in square conflict with decisions to the same effect in the other Circuits.

The Priscilla (C. C. A. 1), 55 F. (2d) 32, 37;
Le Flandre (C. C. A. 3), 9 F. (2d) 331, 332;
The Lizzie M. Walker (C. C. A. 4), 3 F. (2d) 921, 922;
The Wolsum (C. C. A. 5), 14 F. (2d) 371, 376;
Lake Erie Transp. Co. v. *Gilchrist Transp. Co.* (C. C. A. 6), 142 Fed. 89, 95;
Goodrich Transit Co. v. *City of Chicago* (C. C. A. 7), 4 F. (2d) 636, 638;
Northern Nav. Co. v. *Minnesota Atlantic Transp. Co.* (C. C. A. 8), 49 F. (2d) 203, 207;
Pacific Spruce Corp. v. *San Francisco* (C. C. A. 9), 72 F. (2d) 712, 714.

The decision below is also in conflict with the well-settled rule established by the decisions of this Court and in the other Circuits that where a vessel has been placed in extremis by glaring faults of the other, the vessel thus placed in extremis should not be held at fault except upon the clearest evidence.

The Elizabeth Jones, 112 U. S. 514, 526;
The Maggie J. Smith, 123 U. S. 349, 355-6;
The Oregon, 158 U. S. 186, 204;
Rideout v. *Charles Nelson Co.* (C. C. A. 9), 55 F. (2d) 783, 785-6;
The Sea Gull, 23 Wall. 165, 181;
The Nacooche, 137 U. S. 330, 340;
The Carroll, 8 Wall. 302, 306;
The Norne (C. C. A. 5), 59 F. (2d) 145, 148;
The Clara Matthew (D. C. Mass.), 25 F. (2d) 123, 124;
The Shawmut (E. D. Pa.), 261 Fed. 616, 622.

All of the foregoing questions are of the greatest importance. If this Court is to grant a writ of certiorari on the petition of The Great American Insurance Company, it is respectfully submitted that these questions should also be reviewed by this Court.

WHEREFORE, petitioner prays that this Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, directing that it send to this Court for review a full transcript of the record in the said Circuit Court of Appeals for the Second Circuit in the case entitled *In the Matter of the Petition of Companhia de Navegacao Lloyd Brasileiro for exemption from or limitation of its liability as owner of the steamship "Mandu", The Great American Insurance Company, et al., Claimants-Appellants, Companhia de Navegacao Lloyd Brasileiro, Petitioner-Appellee,* being No. 197 of the United States Circuit Court of Appeals for the Second Circuit, October Term 1938, reported as *The Mandu,* 102 F. (2d) 545, and further entitled *In the Matter of the Petition of Companhia de Navegacao Lloyd Brasileiro for exemption from or limitation of its liability, as owner of the steamship "Mandu", Companhia de Navegacao Lloyd Brasileiro, Petitioner-Appellant, The Great American Insurance Company, Claimant-Appellee,* being No. 388, October Term, 1940, reported as *The Mandu,* 114 F. (2d) 361, and that the decision of the Circuit Court of Appeals for the Second Circuit, dated March 6, 1939, reported 102 F. (2d) 459, and the order entered thereon March 27, 1939, and the decision of the Circuit Court of Appeals for the Second Circuit dated July 27, 1940 reported 114 F. (2d) 361, and the order entered thereon August 21, 1940, be reversed and that the final decree of the District Court entered herein on the 9th day of February, 1938 (R. 1676) be restored, that the claim of The Great American In-

surance Company be dismissed, and for such further relief in the premises as may be just.

Dated, New York, N. Y., November 19, 1940.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
By FRANK J. MCCONNELL,
Proctor.

JAMES D. BROWN,
T. CATESBY JONES,
LEONARD J. MATTESON,
Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Nos.

In the Matter

of the

Petition of COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO, for exemption from or limitation of liability, as owner of the Steamship "MANDU",

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
Petitioner-Shipowner,

THE GREAT AMERICAN INSURANCE COMPANY, *et al.*,
Respondents-Cargo Claimants.

BRIEF FOR PETITIONER SHIPOWNER.

The Opinions Below.

The Opinions of the District Court.

The opinion of Campbell, *D. J.*, dated August 22, 1930, on exceptions to the first libel is not officially reported but is unofficially reported, 1930 A. M. C. 1672. It is printed in the Record, R. 28.

The opinion of Campbell, *D. J.*, dated September 4, 1935, on motion to suppress interrogatories is officially reported at 11 F. Supp. 845 and unofficially reported, 1935 A. M. C. 1194. It is printed in the Record, R. 153.

The opinion of Moscowitz, *D. J.*, dated June 3, 1936,

on claimants' exceptions to the amended petition is officially reported at 15 F. Supp. 627 and unofficially reported, 1936 A. M. C. 816. It is printed in the Record, R. 210.

The opinion of Inch, *D. J.*, dated July 21, 1937, dismissing the claim of The Great American Insurance Company but allowing time for the filing of additional claims is officially reported at 20 F. Supp. 820 and unofficially reported, 1937 A. M. C. 1062. It is printed in the Record, R. 500.

The opinion of Inch, *D. J.*, dated December 6, 1937, on petitioner's exceptions to new claims directing the dismissal of the claims and allowing the withdrawal of the petition is officially reported at 21 F. Supp. 372 and unofficially reported, 1938 A. M. C. 45. It is printed in the Record, R. 636.

The opinion of Inch, *D. J.*, dated October 16, 1939, on the merits is not officially reported but is unofficially reported, 1939 A. M. C. 1313. It is printed in the Record, R. 2173.

The Opinions of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals on the first appeal dated March 6, 1939, reversing the decree of the District Court dismissing the claims, and sending the case back for decision on the merits is officially reported at 102 F. (2d) 459 and is unofficially reported at 1939 A. M. C. 287. It is printed in the Record, R. 738a.

The opinion of the Circuit Court of Appeals on the second appeal is officially reported at 114 F. (2d) 361 and is unofficially reported in 1940 A. M. C. 1150. It is printed in the Record, R. 2204.

Jurisdiction of This Court.

This is an admiralty proceeding instituted by Companhia de Navegacao Lloyd Brasileiro for exemption from or limitation of its liability as owner of the Brazilian steamship "Mandu" by reason of a collision between that vessel and the German steamship "Denderah" in the Harbor of the Port of Santos, Brazil, in the territorial waters of the Republic of Brazil, on July 31, 1929, as a result of which the "Denderah" sank. The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938, 28 U. S. C. A., Sec. 347.

Facts.

The case has been stated in the petition. The following summary of the findings of fact of the District Court and of the Circuit Court of Appeals which are concurrent, may be helpful.

The collision occurred at 7:27 P. M. on July 31, 1929. The "Mandu" was bound out of Santos Harbor and was approaching a final right angle turn in the channel leading to sea when she sighted the "Denderah" well to port beyond the turn in the channel, bound in. The Circuit Court of Appeals found concurrently with the District Court that the vessels were then a mile apart, and that, although the apparent course of the "Denderah" was across the bow of the "Mandu", the situation was in fact one of two vessels meeting rather than crossing. (See this Court's decision in *The Victory and The Plymothian*, 168 U. S. 410.) The "Mandu" twice sounded a one-blast signal to the "Denderah" and each time directed her course slightly to her starboard. Nevertheless, the "Denderah" did not answer either of these

signals (R. 2205). The steamship "West Calumb", which was following the "Mandu" out, turned to her port side of the channel and sounded a two blast signal to the "Denderah". The "Denderah" answered with two blasts. Because of poor lookout and inattention, those on the "Denderah" believed that the two blast signal which they answered had been blown by the "Mandu". The "Mandu" then blew a third one blast signal and again turned slightly to her starboard. The "Denderah" immediately answered with a one blast signal. The "Mandu" and the "Denderah" were then about one-half mile apart. The "Mandu" had reduced her speed and continued somewhat to starboard of her original course. Four minutes elapsed between the exchange of the third one blast signals and the collision. During part of this time, the Courts below found that both vessels were reversing at full speed. Both Courts found that the "Denderah", if properly navigated, could have passed port to port with the "Mandu" and starboard to starboard with the "West Calumb". The collision occurred at the turn in the channel within the "Mandu's" water, *i. e.*, on the "Mandu's" side of the channel (R. 2206).

The "Denderah's" faults were numerous and glaring. Although disputed in the District Court, they were conceded in the Circuit Court of Appeals (R. 2206). She entered a harbor of known danger, without a pilot, in charge of a captain unfamiliar with the waters. She had no lookout and her navigators were inattentive. She violated the Narrow Channel Rule and for some unexplained reason brought herself broadside across the course of the "Mandu", which had continually maintained her course on her own starboard side of the channel and had indicated by whistle signal that she intended to do so. It is significant that the "Denderah's" captain did not testify and that the owners of the "Denderah" never

made any claim against the "Mandu" (R. 2206). The only claims made against the "Mandu" were by the claimant, The Great American Insurance Company, on behalf of foreign interests, chiefly German (R. 2206).

POINT I.

The decision of the Circuit Court of Appeals on the first appeal in this case which held that a bare assignment without consideration and which was not intended to transfer any beneficial interest to the assignee, is sufficient to enable such an assignee to maintain a suit in admiralty is in direct conflict with the decision of this Court in *Fretz* v. *Bull* and with the decisions in the Fifth and Ninth Circuits.

In *Fretz* v. *Bull*, 12 How. (53 U. S.) 465, 468, this Court said:

> "In admiralty, the party entitled to relief should always be made libellant; and the practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred only obtains in particular cases."

This decision by this Court in 1851 adopted almost verbatim the statement of this well-recognized principle of Admiralty law as set forth in Benedict on Admiralty, 1st Ed., Sec. 380, which was cited by the Court.

In Benedict on Admiralty, 1st Ed. (1850), Sec. 380, written by Erasmus C. Benedict, it was said:

> "The party really entitled to the relief should always be made libellant. The practice of instituting suit in the name of one person for the benefit of

another, to whom the right has been transferred, and of making one person libellant as the representative of many others, does not obtain in admiralty, though in cases of salvage and some other cases, something analogous to it occurs as will be shown."

This exact language was used in the Second Edition of Benedict (1870) by the same authority and again in the Third Edition edited by Robert D. Benedict (1894), Sec. 380. In the Fourth Edition of Benedict (Edward G. Benedict, 1910) Sec. 309, the language is slightly changed but *Fretz* v. *Bull*, 12 Howard (53 U. S.) 465, is cited as the leading authority. The language was again modified in the Fifth Edition of Benedict on Admiralty (George V. A. McCloskey, 1925), Sec. 244, and again *Fretz* v. *Bull* is referred to as the leading authority. In the Sixth Edition of Benedict on Admiralty just published (Arnold W. Knauth, 1940) the subject is further discussed, Sec. 245. This edition, published since the first decision of the Circuit Court of Appeals below in the instant case, cites that case, *The Mandu*, 102 F. (2d) 459, for the proposition that causes of action for tort are freely assignable except in cases of bodily injury or wrongful death and may be prosecuted in Admiralty in the name of the assignor or assignee. The author, however, because of the present conflict finds it necessary to say that "a merely colorable assignment of a foreign claim to a citizen for the purpose of influencing the Court to take jurisdiction of a wholly foreign cause of action has been disregarded", citing this Court's decision in *Canada Malting Co.* v. *Patterson*, 285 U. S. 413, and *Goldman* v. *Furness Withy & Co.* (S. D. N. Y.) 101 Fed. 467.

It appears, therefore, that if the decision below is good law the established rule in Admiralty recognized and

stated by this Court as long ago as *Fretz* v. *Bull*, 12 How. (53 U. S.) 465, may be disregarded, because in the view of the first decision of the Circuit Court of Appeals in this case that rule is no longer law.

The Circuit Court of Appeals bases its disregard of all previous decisions and the rule as stated by the classic work on practice in the Admiralty upon a decision by Judge Neterer, in which he cites common law cases only to sustain his decision. In the subsequent case of *The Eemdyjk*, 286 Fed. 385, Judge Neterer, when he later considered the same question did not even mention *The Rupert City*, but referred to *The Trader*, 129 Fed. 462, as the authority on the subject.

The decision of the Circuit Court of Appeals is in conflict with *The Trader* (W. D. Wash.), 129 Fed. 462, at pages 471, 472. In that case the Court dismissed the claim of an intervening libellant based on an assignment solely for the purpose of bringing suit, saying.

> "The intervening libellant has no standing in a court of admiralty, for the reason that the evidence proves affirmatively that he has no interest in any of the matters in controversy. He paid nothing to either of the owners of merchandise or baggage alleged to have been lost or damaged, and the several assignments of claims alleged in his libel were intended to give only color of a right to sue for damages. Courts of admiralty do not encourage litigation by mere volunteers. *The Prussia* (D. C.), 100 Fed. 486; *Minturn* v. *Alexandre* (D. C.), 5 Fed. 119; *Fretz* v. *Bull*, 12 How. 468, 13 L. Ed. 1068."

To the same effect see:

Wittig v. *Canada Steamship Lines, Ltd.*, 59 F. (2d) 428, 429;
The Lady Drake, 1 F. Supp. 317, 318.

The Circuit Court of Appeals did not mention any of these decisions in its opinion when it said that the practice in admiralty was the same as that in the New York courts. Its reliance was upon *The Rupert City*, 213 Fed. 263 (R. 738b), a case which we have shown is out of line with all the authorities, and was disregarded by the judge who decided it in the later case of *The Eemdyjk*, 286 Fed. 385, 386. This Court cited *The Eemdyjk*, 286 Fed. 385, in *Canada Malting Co.* v. *Patterson*, 285 U. S. 413, 423. This Court ignored *The Rupert City*, 213 F. 263. *The Eemdyjk* was also commented upon in *Wittig* v. *Canada Steamship Lines*, 59 F. (2d) 428, 430, where it was said:

> "In *The Eemdyjk* there is nothing to show that its transfer was made simply to obtain jurisdiction."

The decision of the Circuit Court of Appeals is in conflict with the decisions in the Fifth Circuit. In the case of *Eastfield S. S. Co.* v. *McKeon, et al.* (S. D. Ala.), 186 Fed. 357 the District Court applied the law as stated in *Fretz* v. *Bull*, 12 How. (53 U. S.) 465, 468, and in Benedict on Admiralty, 1st. Ed., Sec. 380. The Court said:

> "The party really entitled to the relief should always be made libellant. The practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred, and of making one person libellant as the representative of another, does not obtain in admiralty, except in certain cases, as of salvage and other cases somewhat analogous * * *" (p. 357).

Having found that the libellant had no interest in the suit, the Court denied a motion to allow the libellant to amend and to sue in a representative capacity. On appeal, the Circuit Court of Appeals for the Fifth Circuit in *Eastfield S. S. Co.* v. *McKeon* (C. C. A. 5), 201 Fed.

465, approved the statement of the law by the District Court but reversed its decision "upon the peculiar undisputed facts shown by the evidence". The Court said:

> "We do not think it necessary to review and attempt to harmonize the many authorities cited by the learned proctors in their elaborate briefs, nor those recited and relied upon by the District Judge *with whose main proposition that suits in admiralty should be prosecuted in the name of a real party in interest, we agree*, for we decide this case upon the peculiar undisputed facts shown by the evidence" (p. 470). (Italics ours.)

The decision of the Circuit Court of Appeals on the first appeal is in conflict with the long established principles of Admiralty practice, as stated by this Court in *Fretz* v. *Bull, supra*, and applied by the Courts in other Circuits and for that reason should be reviewed by this Court.

POINT II.

The decision of the Circuit Court of Appeals upon the first appeal holding that the refusal by the District Court to entertain jurisdiction in a suit between foreigners arising out of a collision occurring in the territorial waters of a foreign country where jurisdiction was supported only by a colorable assignment of claims, without consideration and without transfer of beneficial ownership, was an abuse of discretion, is in square conflict with the decisions of this Court in *Canada Malting Co.* v. *Patterson*, 285 U. S. 413 and other cases.

In *Canada Malting Co.* v. *Patterson*, 285 U. S. 413, 421, this Court said:

> "The rule recognizing an unqualified discretion to

> decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower Federal Courts."

This Court approved and applied this rule and in that case, which was an action for cargo damage which occurred on a Canadian vessel plying the Great Lakes between Canadian ports, resulting from a collision which occurred in American waters, this Court affirmed the dismissal of the libel, saying:

> "It is difficult to conceive of a state of facts more clearly justifying the refusal of a District Court to retain jurisdiction in a cause between foreigners" (p. 424).

In this case, it now appears, without question, that the libellants and claimants are all foreigners; that their claims arise out of damage to cargo almost entirely German owned, laden on a German vessel damaged or lost as the result of a collision which occurred in the territorial waters of Brazil in the Harbor of Santos, more than 5,000 miles from the jurisdiction of the Court where action was brought. Your petitioner is a Brazilian corporation and the steamship "Mandu" was a Brazilian vessel. We submit that it is difficult to conceive of a state of facts more clearly justifying the refusal of the District Court to retain jurisdiction of this cause between foreigners.

The statement of this Court in *Canada Malting Co.* v. *Patterson*, 285 U. S. 413, 421, quoted *supra*, was but a restatement of the position which it had taken in *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515. Among the decisions of the lower Federal Courts referred to in the passage quoted are the following:

> *The Falco*, 20 F. (2d) 362 (C. C. A. 2);
> *The Lady Drake*, 1 F. Supp. 317, at page 318;

Wittig v. *Canada S. S. Lines, Ltd.* (W. D. N. Y.), 59 F. (2d) 428;

The Beaverbrae (E. D. N. Y., Campbell, *D. J.*), 60 F. (2d) 363;

The Paula (*Peters* case) (C. C. A. 2), 91 F. (2d) 1001;

The Tricolor, 1 F. Supp. 934 (S. D. N. Y.), affirmed (C. C. A. 2), 65 F. (2d) 392.

The District Court, observed in this case that:

> "There is no doubt but that the United States citizen was endeavoring to represent foreign underwriters by allegations which were either not proved or shown to be false, but in no instance could this claim of the United States citizen be held a claim filed in a representative capacity. On the contrary, it was one filed in its own alleged right. This claim was held to be invalid and not capable of amendment" (R. 638).

The allegations of the libels and the claim were that The Great American Insurance Company, as assignee of the claims "for a valuable consideration" was "now the owner and holder thereof" (R. 24, R. 39, R. 50, R. 95). These allegations were not sustained because the District Court found "all the claims now sought to be enforced are those of foreign underwriters of cargo on a German ship damaged in a collision with another foreign ship in foreign waters" (R. 638), and that the efforts to prove a real transfer failed for want of proof or for false proof.

It is elementary that jurisdiction cannot be obtained in Admiralty by concealment or by pleading misleading facts.